No. 89-7662

In The

Supreme Court of the United States

October Term, 1990

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does a state court's summary order satisfy the plain statement rule of *Harris v. Reed*, 489 U.S. 255 (1989), if it refers to the federal merits and does not make clear that a state procedural ground is an independent basis for decision?

2. Does the failure of post-conviction counsel to file a timely notice of appeal constitute cause to excuse the resulting procedural default that would otherwise bar federal habeas relief?

3. Should *Fay v. Noia*, 372 U.S. 391 (1963), be applied to relieve a state prisoner of a procedural default resulting from counsel's unauthorized failure to take a timely appeal?

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The opinion of the United States Court of Appeals for the Fourth Circuit affirming the dismissal of petitioner's federal petition for a writ of habeas corpus, reported at 895 F.2d 139 (4th Cir. 1990), and the order of the Court of Appeals denying petitioner's application for rehearing and rehearing *en banc*, reported at 1990 U.S. App. Lexis 3189 (4th Cir. Feb. 27, 1990), are reproduced in the Joint Appendix at 53 to 69. The opinion of the United States District Court for the Western District of Virginia, issued on December 6, 1988, is reproduced in the Joint Appendix ("JA") at 35 to 52.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the denial of petitioner's habeas corpus petition under 28 U.S.C. § 2254 was entered on January 31, 1990. The Court of Appeals denied the petition for rehearing and rehearing *en banc* on February 27, 1990. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is 28 U.S.C. § 2254(a)-(c):

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment

of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

On March 18, 1982, petitioner Roger Keith Coleman was convicted in the Circuit Court for Buchanan County, Virginia, of the rape and the murder of his sister-in-law, Wanda Fay McCoy. On the following day, the jury fixed Coleman's punishment at death. The court imposed the sentence of death on April 23, 1982. The Virginia Supreme Court affirmed the conviction and sentence on September 4, 1983. *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983). Coleman's petition for a writ of certiorari was denied by the Court on March 19, 1984. 465 U.S. 1109 (1984).

On April 26, 1984, Coleman filed a petition for a writ of habeas corpus in the Circuit Court for Buchanan

County and amended that petition on September 7, 1984. (Joint Appendix for *Coleman v. Thompson*, United States Court of Appeals for the Fourth Circuit, 591-647.) ("Fourth Cir. App.") In November 1985, an evidentiary hearing was held in the Circuit Court before Judge Phillips. At the hearing, Coleman introduced evidence that before trial, one of the jurors had expressed a desire to sit on the jury so he could "help burn the S.O.B." (Fourth Cir. App. 680.) This evidence of juror bias did not come to light until well after Coleman's conviction and direct appeal.

Coleman also introduced evidence to demonstrate that he had not received effective representation from his trial counsel at any stage of the proceedings, commencing with the motion to change venue and concluding with the sentencing proceeding. Most notably, trial counsel failed to investigate and introduce evidence in support of Coleman's alibi defense and to take other steps to support Coleman's steadfast insistence on his innocence. Counsel failed to interview and to prepare for the cross-examination of a jailhouse informant. Furthermore, counsel failed to cross-examine effectively the prosecution's forensic expert whose testimony was the only link between Coleman and the crime. (Fourth Cir. App. 649-946; 954-70.) Coleman also presented evidence demonstrating that the prosecution had withheld exculpatory materials within its possession. (Fourth Cir. App. 1143; 1046-48.)

On June 23, 1986, Circuit Judge Phillips issued a letter opinion indicating his intention to deny Coleman's petition and directing the Commonwealth's attorney to prepare a final order. (JA 3-15.) On September 4, 1986, Judge Phillips signed the final order, adopting verbatim

the proposed order submitted by the Commonwealth, including a number of findings not in the June 23 letter opinion.[1] (JA 16-19.) On September 9, 1986, the order was entered in the docket book for the Circuit Court of Buchanan County and mailed to Coleman's counsel. (Fourth Cir. App. 989-94.)

On October 6, 1986, Coleman's counsel sent a notice of appeal to the Circuit Court by first class mail. (JA 29, 33.) The notice was deemed filed when it was received in the clerk's office on October 7. Had the notice been sent by registered or certified mail, it would have been deemed filed upon dispatch rather than upon receipt. Va. Sup. Ct. Rule 5:5(b). Coleman's petition for appeal, which briefed the merits of his claims, was filed with the Virginia Supreme Court on December 4, 1986. (JA 25.)

On December 9, 1986, the Commonwealth filed a motion to dismiss the appeal on the ground that the appeal had been filed one day late when measured from the day on which Judge Phillips signed the order to the day on which the Circuit Court received the notice. (JA 22-24.) The Commonwealth asked the Virginia Supreme Court for an expedited decision on the motion to dismiss so that it would be unnecessary for it to brief the merits of the appeal. (JA 23-24.) The Virginia Supreme Court did not grant the Commonwealth's request and required full briefing of the merits.

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[1] In denying Coleman's juror bias claim, the Circuit Court never determined whether the juror had stated that he wanted to be on the jury to help "burn" Coleman. The court instead relied solely upon the juror's voir dire testimony to the effect that he was unbiased. (JA 5-6.)

On May 19, 1987, four months after briefing on the merits was complete, the Virginia Supreme Court issued a summary order dismissing the appeal. The order listed all the briefs filed – including the merits' briefs – and concluded that "[u]pon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." (JA 25-26.) The order did not reveal the court's reasoning. Coleman's motion for rehearing was denied on June 12, 1987. (JA 27.) This Court denied Coleman's petition for a writ of certiorari on October 19, 1987. *Coleman v. Bass*, 484 U.S. 918 (1987).

On April 22, 1988, Coleman filed a federal habeas petition in the United States District Court for the Western District of Virginia. The Commonwealth moved to dismiss, asserting that the petition was without merit and that the Virginia Supreme Court's summary dismissal of Coleman's state habeas appeal constituted a procedural bar to the petition. The Commonwealth acknowledged that Coleman had exhausted his state remedies by appealing to the Virginia Supreme Court. Respondent's Brief in Support of Motion to Dismiss Federal Habeas Petition, dated May 16, 1988, at 4. Coleman argued the merits of his claims and sought an evidentiary hearing because the state habeas court had never ruled on certain factual issues critical to its legal conclusions. Coleman also argued that his claims were not procedurally barred because he had intended to appeal and his intentions were frustrated by his counsel. (JA 33, 39.) On December 6, 1988, the district court granted the motion to dismiss, ruling in the alternative that the federal constitutional claims raised by Coleman were defaulted and that his petition lacked merit. (JA 39, 51-52.)

The Fourth Circuit affirmed in an opinion issued January 31, 1990. *Coleman v. Thompson*, 895 F.2d 139 (4th Cir. 1990). (JA 53-68.) The Court of Appeals concluded that the Virginia Supreme Court's dismissal of petitioner's appeal procedurally barred his federal constitutional claims. The court declined to excuse the resulting procedural default under either *Wainwright v. Sykes*, 433 U.S. 72 (1977), or *Fay v. Noia*, 372 U.S. 391 (1963). 895 F.2d at 143-44. (JA 59-61.) Coleman's application for rehearing and rehearing *en banc* was denied on February 27, 1990. 1990 U.S. App. Lexis 3189. (JA 69.)

Coleman filed his petition for a writ of certiorari on May 29, 1990. The Court granted the petition on October 29, 1990, to consider three of the four questions stated in the petition, namely:

> Under *Harris v. Reed*, is it permissible for a federal court to analyze state law and the state court record to determine whether federal claims are barred by state procedural default?
>
> Should a federal court waive a procedural default resulting from post-conviction counsel's failure to file a timely appeal when the default would bar any hearing of the petitioner's constitutional claims?
>
> Does the deliberate bypass standard of *Fay v. Noia* continue to apply to a procedural default resulting from a failure to appeal at all?

SUMMARY OF ARGUMENT

The Virginia Supreme Court's order dismissing Coleman's petition for appeal does not meet the requirements

of the plain statement rule of *Harris v. Reed*, 489 U.S. 255 (1989), and thus does not present a procedural bar to the hearing of Coleman's claims on federal habeas. The order is ambiguous because it expressly states that the court considered the briefs on the federal merits and does not state that the state's procedural rule was an independent basis for decision. The ambiguity is not simply hypothetical: the Virginia Supreme Court has in other cases considered the merits of federal constitutional claims to inform its decision whether or not to waive the application of its rules with respect to the time for filing an appeal; nothing in the order implies it did otherwise in Coleman's case. Accordingly, there is no basis for concluding that there was an independent state law ground for the dismissal that would bar federal habeas corpus review.

Even if the Court were to find that the Virginia Supreme Court's order rested on an independent state procedural ground, the state default should not preclude federal habeas relief. First, the late filing of the notice of appeal by Coleman's post-conviction counsel constitutes "cause" to excuse the procedural default under *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Fourth Circuit misinterpreted *Murray v. Carrier*, 477 U.S. 478 (1986), when it ruled that post-conviction counsel's ineffectiveness could never be cause. The proper reading of *Carrier* is that an attorney's dereliction constitutes cause whenever it prevents a defendant from complying with a state's procedural rules and falls outside "the wide range of reasonable professional assistance," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), regardless of whether that attorney's assistance is constitutionally mandated. Failure to excuse a procedural default resulting from ineffective

post-conviction counsel would remove the safeguard that effective representation provides against the improvident loss of federal constitutional claims.

Second, Coleman's failure to appeal was not a deliberate bypass of the orderly procedures of the Virginia courts and therefore should not bar federal habeas review. *Fay v. Noia*, 372 U.S. 391 (1963). The Court's opinions recognize that certain fundamental decisions, like the decision to appeal, can be made only by the petitioner. Coleman's desire to appeal is undisputed; consequently, the default resulting from his counsel's failure to file the notice of appeal in a timely manner should not bar federal review.

ARGUMENT

I.

THE VIRGINIA SUPREME COURT'S ORDER IS NOT DEMONSTRABLY BASED ON A STATE PROCEDURAL RULE WHICH IS INDEPENDENT OF THE FEDERAL MERITS OF PETITIONER'S CLAIMS.

Under the plain statement rule of *Harris v. Reed*, 489 U.S. 255 (1989), a federal habeas court must presume that a state court reached the merits of a federal claim unless it is apparent from the face of the state court decision that there is an adequate and independent state procedural law basis for decision. If the presumption attaches, the federal claims must be heard in the federal habeas court.

In the present case, the Virginia court took briefs on the merits before considering the Commonwealth's motion to dismiss based on the timeliness of Coleman's

appeal. The order dismissing the petition for appeal states that the court considered the briefs on the federal merits as well as those on state law. The order does not state that the dismissal was independently based on a state procedural rule. There are thus two possibilities: *(1)* without considering petitioner's federal constitutional claims, the Virginia Supreme Court dismissed because it found the appeal barred as untimely; *(2)* it dismissed the appeal as untimely *because* it found the federal constitutional claims to be without merit.[2] If the latter occurred (and there is no basis for presuming that it did not), the state law ground for dismissal is not independent of federal law. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). Under such circumstances, *Harris* requires that the federal court presume that the federal merits were reached, and there is no bar to federal habeas review.

A. The Virginia Supreme Court Order Does Not Contain A Plain Statement That It Is Based On An Independent State Ground.

On its face, the Virginia Supreme Court's summary order dismissing Coleman's habeas petition is ambiguous.[3] The order lists all the papers filed by the parties

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[2] While the Virginia Supreme Court's language in summarily denying petitions for appeal is not always precise, we do not contend that the Virginia Supreme Court misstated the basis for its decision and that the dismissal was directly on the federal merits. *Cf. Irvin v. Dowd*, 359 U.S. 394, 404 (1959).

[3] The complete order of the Virginia Supreme Court, reproduced at JA 25-26, reads as follows:

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– papers that include briefs on the merits – and states that, "[u]pon consideration whereof," the Commonwealth's motion is granted and the petition for appeal is dismissed. The order thus makes clear that the court considered both the federal merits of petitioner's claims and the state procedural grounds. The order does not explicate any basis for the dismissal and does not say that the Virginia court granted the motion to dismiss independently of any consideration of the federal claims.

The order does not mention procedural default or the fact that the notice of appeal was filed one day late. It does not refer to Virginia Supreme Court Rule 5:9 (the rule relied upon by the Fourth Circuit for its interpretation of the order)[4] or to *Saunders v. Reynolds*, 214 Va. 697,

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On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.

Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal [December 9, 1986]; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 23, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.

[4] Rule 5:9(a) states: "No appeal shall be allowed unless, within 30 days after entry of final judgment or other

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204 S.E.2d 421 (1974) (which the Commonwealth asserts explains the Virginia Supreme Court's reasoning process in "dismissing" appeals). Nor does the order state that the appeal was being dismissed "for the reasons stated in the Commonwealth's motion to dismiss." *Cf. Harris*, 489 U.S. at 266.

The absence of a statement of reasons in the order is significant because the Virginia Supreme Court on occasion examines the merits of federal constitutional claims in order to decide whether or not to hear late-filed appeals. *See, e.g., O'Brien v. Socony Mobil Oil Co.*, 207 Va. 707, 715, 152 S.E.2d 278, 284 (1967) (late appeal dismissed because plaintiff had not been denied any constitutional right), *cert. denied*, 389 U.S. 825 (1967); *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970).[5] In *O'Brien*, the

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appealable order or decree, counsel for the appellant filed with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel." The rule was enacted pursuant to an order of the Virginia Supreme Court.

In order to perfect an appeal to the Virginia Supreme Court, the appellant must also file a petition for appeal within three months of entry of judgment. Va. Sup. Ct. Rule 5:17(a). The latter requirement, unlike Rule 5:9, is dictated by statute. *See* Va. Code § 8:01-671. Coleman's petition for appeal was filed within the statutorily mandated period.

[5] Virginia's conflicting precedents regarding its time limits for taking appeals highlight the wisdom of the plain statement rule. Although the time limits are described as "mandatory," *see* Virginia Supreme Court Rule 5:5(a), the Virginia Supreme Court has granted relief from their requirements. *See Tharp v.*

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parties briefed both the lateness of the appeal and the appeal's merits to the Virginia Supreme Court. The court noted that it had permitted late appeals in the past where appellants "had been denied their constitutional rights." 207 Va. at 715, 152 S.E.2d at 284. Because it determined that appellant's assertion that the Virginia statute at issue unconstitutionally deprived her of a vested property right was without merit, the court declined to hear the late-filed appeal and deferred decision as to whether it would hear late-filed appeals concerning deprivations of constitutional property rights. *Id.* Like the order at issue here, the opinion concluded with the words "appeal dismissed." *Id.* at 719, 152 S.E.2d at 287.

A state basis of decision will not bar federal review of a federal issue which was before the state court unless the state ground is adequate and independent.[6] In

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Commonwealth, 211 Va. 1, 175 S.E.2d 277 (1970); *O'Brien*, 207 Va. at 715, 152 S.E.2d at 284. At one time, the court routinely allowed late appeals, but it found that attorneys were abusing the court's "indulgence." *See Tharp*, 211 Va. at 2-3, 175 S.E.2d at 278. In *Tharp*, the court held that it would allow late appeals only to correct constitutional violations. ("Henceforth we will extend the time for filing a petition for a writ of error only if it is found that to deny the extension would abridge a constitutional right."). *Id. See also National Capital Naturists, Inc. v. Board of Supervisors*, 878 F.2d 128, 132 (4th Cir. 1989) (where petition for appeal presents no constitutional claims, Virginia Supreme Court will not hear untimely appeal) (citing *Tharp*).

[6] When a judgment rests on an adequate and independent state law ground, federal review is precluded because the state court judgment will stand regardless of the determination on

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Michigan v. Long, 463 U.S. 1032, 1040-41 (1983), for example, the Court found that it had jurisdiction to review a Michigan court decision because that court's analysis of state constitutional law on search and seizure was based upon its view of federal fourth amendment law such that the state ground was not independent of federal law.

Similarly, in *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Court recognized that a state procedural basis for decision may not be independent of federal law. In *Ake*, the Court found that dismissal of a federal claim for failure to comply with the Oklahoma procedural rule precluding

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the federal ground. On direct review, an adequate and independent state ground divests the Court of jurisdiction. *See, e.g., Murdock v. City of Memphis*, 20 Wall 590, 635-636 (1875); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) ("where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment"). The doctrine also applies when the state law basis for decision is procedural. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (procedural bar from failure to raise claim in assignment of error on appeal did not preclude review because the ground was not "separate, adequate, and independent" of federal law); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

As a matter of comity, the Court has applied the adequate and independent state ground doctrine to bar federal habeas review even though an adequate and independent state ground does not "dispossess the federal courts of jurisdiction on collateral review." *Harris*, 489 U.S. at 267 (Stevens, J., concurring) (citing *Wainwright v. Sykes*, 433 U.S. 72, 82-84 (1977), and *Fay v. Noia*, 372 U.S. 391, 426-35 (1963)).

appellate review of any issue not raised in the assignment of error presented in the motion for a new trial unless the error is "fundamental" was not independent of federal law, because errors of federal constitutional law are included within the definition of "fundamental error." *Ake*, 470 U.S. at 74-75. Because "resolution of the state procedural law question depend[ed] on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law." *Id. See also Williams v. Georgia*, 349 U.S. 375, 383, 389 (1955).

B. The Fourth Circuit's Analysis Of State Law To Resolve The Ambiguity In The Virginia Supreme Court's Order Violates The Rule Of *Harris v. Reed*.

The Virginia Supreme Court's dismissal order lacks a plain statement of its basis; accordingly, it cannot be presumed to be based upon an adequate and independent state ground. This Court created the plain statement rule to provide a "consistent approach for resolving th[e] vexing issue" of determining the basis of state court decisions. *Long*, 463 U.S. at 1038.[7] In *Long*, the Court formulated the plain statement rule as follows:

> when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

[7] Before *Long*, the Court had applied a number of methods to obtain clarification of state court rulings, among them, vacating or continuing a case while requesting clarification from the state court, and analyzing state law to determine the basis of the decision. *See Long*, 463 U.S. at 1038-39.

Id. at 1040-41.

In *Harris v. Reed*, the Court extended the plain statement rule to apply to the determination of whether an adequate and independent state ground barred federal habeas review of state court decisions:

> Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar.

Harris, 489 U.S. at 263 (quoting *Caldwell*, 472 U.S. at 327). *Harris* further recognized that the plain statement rule applied to summary orders such as the one issued by the Virginia Supreme Court in *Coleman*: "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.' " 489 U.S. at 265.

The Fourth Circuit failed to follow the "plain statement" rule when, in an attempt to resolve the ambiguity inherent in the order, it examined Virginia law. Because nothing in the order informed the Fourth Circuit of its basis, the court looked to other sources: the Commonwealth's motion to dismiss the appeal[8] and Virginia

[8] The Fourth Circuit could not properly find that the dismissal was based on procedural grounds simply because the

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Supreme Court Rule 5:9. The court noted that the motion was based on Rule 5:9, and it found that rule to be a mandatory rule constituting an adequate state ground.[9] 895 F.2d at 143 (JA 58.) (citing Virginia Supreme Court Rule 5:9 and *Vaughn v. Vaughn*, 215 Va. 328, 210 S.E.2d 140 (1974)). The Fourth Circuit failed to explain the significance of the Virginia Supreme Court's consideration of the merits' briefs or of the court's consideration of the federal merits in other cases to inform its decision of whether to hear a late-filed appeal.[10]

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motion to dismiss was brought on procedural grounds. In the absence of a clear statement, it is not for the federal courts to determine what an order inherently means. Thus, the Sixth Circuit has recognized that *Harris* precludes analysis of state law in determining the meaning of summary orders declining to hear late appeals. *See, e.g., Johnson v. Burke*, 903 F.2d 1056, 1059 (6th Cir.) (rejecting state's assertion that denial of an application to file a delayed appeal is "inherently a decision that relies on procedural grounds"), *cert. denied*, 111 S. Ct. 178 (1990); *Hill v. McMackin*, 893 F.2d 810, 813-14 (6th Cir. 1989).

[9] Contrary to the Fourth Circuit's conclusion, Coleman's late appeal is not an "adequate" state ground barring federal habeas review. Under Virginia's rules, Coleman's notice of appeal would have been timely if it had been dispatched on October 6 by registered or certified, rather than first class, mail. Va. Sup. Ct. Rule 5:5(b). Both the Commonwealth and the Circuit Court received the notice; neither would have received it sooner had it been certified. Under these circumstances, Coleman's one-day-late filing is not an adequate state ground preventing federal habeas review of his constitutional claims. *Cf. Fay v. Noia*, 372 U.S. at 462 (Harlan, J., dissenting) (questioning adequacy of state rule at issue in *Daniels v. Allen*, 344 U.S. 443 (1953)).

[10] The Fourth Circuit also failed to recognize that Virginia courts know how to say that their decisions are based upon

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The Fourth Circuit's approach conflicts directly with *Harris v. Reed*. In *Harris*, the Court acknowledged that the Illinois court's reference to a procedural default rule coupled with its statement that certain of the petitioner's claims fell within the parameters of that rule "perhaps laid the foundation" for a finding of procedural bar. 489 U.S. at 266. However, the Court declined to find that these references constituted an adequate and independent state ground because the state court discussion fell "short of an explicit reliance on a state-law ground." *Id.* The Court did not attempt to cure the ambiguity by analyzing state law to determine whether the procedural bar was mandatory. Indeed, the Court recognized that failure "to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim." *Id.* at 261. Instead, the state court must have "actually relied on the procedural bar as an independent basis for its disposition of the case." *Id.* at 261-62 (quoting *Caldwell*, 472 U.S. at 327).

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independent procedural grounds. *See, e.g., Dodson v. Director of Corrections*, 233 Va. 303, 305, 355 S.E.2d 573, 574 (1987) (quoting dismissal of petition for appeal because "the appeal was not perfected in the manner provided by law. . . . Rule 5:14(a)"); *Titcomb v. Wyant*, 323 S.E.2d 800 (Va. 1984) (dismissal of habeas appeal by stating: "On consideration whereof, the Court holds that exclusive jurisdiction over this appeal lies with the Court of Appeals, pursuant to Code §§ 17-116.04 and 17-116.05:4".); *Coppola v. Warden*, 222 Va. 369, 373, 282 S.E.2d 10, 12 (1981) ("Having ruled that the procedural question is dispositive, we do not reach [the federal question]. We will affirm the judgment of the trial court dismissing the petition."), *cert. denied*, 455 U.S. 927 (1982).

The same analysis compels a finding that the Virginia order is ambiguous. The order mentions both state and federal law and implies that the court considered both. As in *Harris*, there is no "explicit reliance" on an independent state law basis. *See Harris*, 489 U.S. at 266. The Fourth Circuit had no basis for finding otherwise.

C. The Plain Statement Rule Provides A Consistent Rule That Does Not Interfere With The Ability Of The State Courts To Enforce Their Procedural Rules.

By providing state courts with a bright line test for how federal courts will determine the basis for state court decisions, the plain statement rule enables state courts to assure that the federal courts give "the respect [they] owe to the procedures erected by the state to correct constitutional errors." *Harris*, 489 U.S. at 268 (O'Connor, J., concurring). The rule's clear terms allow state courts to rely on their own rules of decision and thus, in effect, to restrict federal review simply by expressly stating a procedural bar. *Id.* at 264.[11] In establishing the plain

[11] Since the rule was announced in 1983, "state courts have become familiar with the 'plain statement' requirement under *Long* and *Caldwell*." *Harris*, 489 U.S. at 264. *See, e.g., Shaddy v. Clarke*, 890 F.2d 1016, 1018 (8th Cir. 1989) (summary order of Nebraska Supreme Court dismissing late-filed appeal on state procedural grounds); *Clark v. Dugger*, 901 F.2d 908, 913-14 (11th Cir.) (Florida Supreme Court order clear), *cert. denied*, 111 S. Ct. 372 (199[illegible]; *Anselmo v. Sumner*, 882 F.2d 431, 434 (9th Cir. 1989) (Nevada Supreme Court order clear). In each of these cases, the procedural basis for the state order was apparent from the four corners of the order. Virginia courts also frequently provide plain statements of their reliance on state law. See cases cited in note 10, *supra*.

statement rule, the Court sought a method of analysis that would achieve the "doctrinal consistency that is required when sensitive issues of federal-state relations are involved." *Long*, 463 U.S. at 1039; *see Harris*, 489 U.S. at 262 (extending plain statement rule to collateral review for the same reason).[12] *Harris* frees states from the federal interference that would result from any approach that allowed federal courts to undertake their own state law analysis to decide what they think the state court meant. Once a federal court, like the Fourth Circuit here, purports to tell state courts what their ambiguous orders mean, the state courts lose the discretion that *Harris* ceded to them.

The straightforward analysis that the plain statement rule requires also eases the burden on federal courts for determining the basis for a state court decision. The *Harris* presumption allows a federal court to "rapidly . . . identify whether federal issues are properly presented before it." *Harris*, 489 U.S. at 265. Without such a rule, "the federal habeas court would be forced to examine the state-court record to determine whether procedural default was argued to the state court, or would be required to undertake an extensive analysis of state law to determine whether a procedural bar was potentially

[12] The plain statement rule does not apply to cases where the federal claims were never raised to the state courts, *i.e.*, where the issue is whether the petitioner has exhausted state remedies. *See Harris*, 489 U.S. at 263 n.9; *id.* at 268-70 (O'Connor, J., concurring); *Teague v. Lane*, 489 U.S. 288, 297-98 (1989) (applying state law to determine that issue never raised to state court was procedurally barred).

applicable to the particular case." *Harris*, 489 U.S. at 264-65.

Federal courts are not well equipped to undertake such analysis. It is not simply that the federal court may make an error as to what the state law is (as did the Fourth Circuit in *Coleman*), but that a court can never state conclusively the meaning of an inherently ambiguous order, such as that issued by the Virginia Supreme Court here.

Coleman raised substantial federal constitutional claims in his state habeas corpus petition. The Virginia Supreme Court's order dismissing his appeal does not plainly state that the decision was based on state law. Federal habeas court review of constitutional claims is not barred by a state decision not clearly based on an independent state law ground. The Court should therefore find that Coleman has not defaulted on his federal claims and remand for a determination of the merits.

II.

COLEMAN'S STATE HABEAS COUNSEL'S LATE FILING OF AN APPEAL CONSTITUTES CAUSE TO EXCUSE THE PROCEDURAL DEFAULT.

Even if the Court finds that the Virginia Supreme Court dismissed Coleman's appeal on an independent state ground, it should allow federal review of Coleman's constitutional claims. The Court has recognized that federal habeas courts have jurisdiction to hear a petitioner's federal claims, regardless of state defaults. However, as a matter of comity, it has fashioned a rule of limited discretion that precludes review of federal claims that have

been defaulted in state court, unless federal review is necessary to assure fundamental fairness.[13] The doctrine guiding that discretion is embodied in the "deliberate bypass" and the "cause and prejudice" standards.

Under these standards, a petitioner ordinarily will be held responsible for strategic decisions and even inadvertent mistakes of counsel on matters traditionally committed to the discretion of counsel. However, when counsel is ineffective, or when the default is caused by some impediment external to the defense, the petitioner will not be held to suffer the consequences. In addition, certain fundamental decisions, such as the decision whether to appeal, are not committed to counsel alone. Unless the petitioner himself knowingly and intelligently makes such a decision that results in a default, a federal court will not bar his access to federal habeas.

In this case, counsel's failure to appeal can be neither imputed to Coleman nor characterized as a deliberate bypass of state procedure. Coleman wanted to appeal and had reasonably assumed that his counsel would take the steps required to do so. He cannot be held responsible for

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[13] The Court has recognized that "[t]oday, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.' " *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. at 97 (Stevens, J., concurring)); *see Fay v. Noia*, 372 U.S. 391, 401-02 (1963) ("[I]ts function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints."). But the writ also involves significant costs. *E.g., Engle*, 456 U.S. at 126-28 (writ undermines finality, diminishes the prominence of trial, costs society the right to punish admitted offenders, and intrudes into state processes).

his counsel's failure to file the most routine of documents in a timely manner. Such deficient representation must constitute cause to excuse the default.

Coleman's federal habeas petition presents substantial constitutional claims concerning juror bias, *Brady* violations by the Commonwealth and attorney ineffectiveness at trial.[14] These claims, which go to the heart of the truth-finding process, undermine confidence in the integrity of the verdict and sentence pursuant to which Coleman is to be executed. If the state default is allowed to stand, Roger Coleman will be precluded from demonstrating that the verdict and sentence of death imposed on him are unreliable.

A. Ineffective Assistance Of Post-Conviction Counsel Constitutes Cause.

The Fourth Circuit held that because the assistance of post-conviction counsel is not constitutionally required, the ineffectiveness of such counsel cannot supply

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[14] The Court has recognized that the special role of counsel in criminal proceedings means that the need to vindicate ineffectiveness claims can override concerns for both finality and comity. *See Strickland v. Washington*, 466 U.S. at 697-98 (declining to establish different standards for federal collateral review of ineffectiveness claims, because an ineffectiveness claim is "an attack on the fundamental fairness of the proceeding whose result is challenged" and "fundamental fairness is the central concern" of habeas); *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986) ("[W]hile the Court may . . . refuse for reasons of prudence and comity to burden the State with the costs of the exclusionary rule . . . , the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance.").

"cause."[15] 895 F.2d at 144. (JA 60-61.) While it is true that Coleman had no constitutional right to post-conviction counsel, *Murray v. Giarratano*, 109 S. Ct. 2765 (1989), it does not follow that the ineffectiveness of his counsel cannot constitute cause. The existence of a constitutional right to counsel is irrelevant under *Murray v. Carrier*: "cause" is satisfied whenever a prisoner is prevented from complying with a state procedural rule by an attorney whose performance falls outside "the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. at 689. *Murray v. Carrier* was decided in the

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[15] Because the Fourth Circuit concluded that ineffective assistance of state habeas counsel could not constitute cause to excuse Coleman's procedural default, it did not decide whether counsel's conduct rose to the level of cause. Clearly it did. Courts have consistently held that an attorney's failure to perfect a timely appeal constitutes ineffective assistance of counsel. *E.g., Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990); *United States v. Reyes*, 759 F.2d 351, 353 (4th Cir.), *cert. denied*, 474 U.S. 857 (1985); *Perez v. Wainwright*, 640 F.2d 596, 598 & n.3 (5th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982); *Lucey v. Kavanaugh*, 724 F.2d 560, 562 (6th Cir. 1984), *aff'd sub nom. Evitts v. Lucey*, 469 U.S. 387 (1985); *Clay v. Director*, 749 F.2d 427, 431 (7th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985); *Williams v. Lockhart*, 849 F.2d 1134, 1137 & n.3 (8th Cir. 1988); *Miller v. McCarthy*, 607 F.2d 854, 857 (9th Cir. 1979); *Ferguson v. United States*, 699 F.2d 1071, 1072-73 (11th Cir. 1983); *cf. United States v. Estela-Melendez*, 878 F.2d 24, 26-27 (1st Cir. 1989) (failure to appeal caused by defendant's voluntary decision not to appeal or belated change of heart regarding appeal would not constitute ineffective assistance).

Coleman relied on his attorneys to comply with his decision to appeal. (JA 33.) *See* ABA Model Code of Professional Responsibility DR 6-101(3) & n.5 (1986) (defining "Failing to Act Competently") ("attorneys shall not neglect legal matters entrusted to them").

context of a procedural default caused by attorney error that did not rise to the level of ineffective assistance. Accordingly, the Court's holding that "[a]ttorney error short of ineffective assistance of counsel does not constitute cause," 477 U.S. at 492, is simply an invocation of *Strickland's* functional standard, not a requirement of an independent constitutional violation.[16] To interpret *Carrier* differently would render it internally inconsistent and would frustrate the goal of fundamental fairness.

1. *Murray v. Carrier's* invocation of "ineffective assistance" as the standard for cause refers to a level of attorney competence, not to a sixth amendment right to counsel.

Carrier conceded that his attorney had rendered effective assistance. Thus, the issue presented was whether attorney error not sufficient to contravene the *Strickland* standard could constitute cause.[17] The Court

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[16] Indeed, counsel's failure to take an appeal as requested by his client constitutes cause even without reference to ineffectiveness. *See Jones v. Barnes*, 463 U.S. 745, 755 (1983) (Blackmun, J., concurring in the judgment) ("the attorney, by refusing to carry out his client's express wishes, cannot forever foreclose review of nonfrivolous constitutional claims . . . counsel's failure to raise on appeal nonfrivolous constitutional claims upon which his client has insisted must constitute 'cause and prejudice' for any resulting procedural default under state law"); *id.* at 754 n.7 (reserving question).

[17] After *Wainwright v. Sykes*, a debate raged among the lower federal courts and legal scholars as to what showing of attorney responsibility would suffice to excuse an appellate procedural default. Most courts and commentators agreed that

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held that it could not. "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." 477 U.S. at 488; *see id.* at 492 ("Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default. . . . "); *cf. Murray v. Carrier*, 477 U.S. 478, 524 (1984) (Brennan, J., dissenting) (arguing that inadvertent mistakes should constitute cause).

The Court reasoned that to hold otherwise would mean that federal courts would "routinely be required to hold evidentiary hearings to determine what prompted

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counsel's strategic decisions not to raise issues on appeal could not constitute cause. But they disagreed as to whether counsel's inadvertent or ignorant errors should constitute cause or whether cause could be satisfied only by error rising to the level of ineffective assistance of counsel. *Compare Alcorn v. Smith*, 781 F.2d 58 (6th Cir. 1986), *with Carrier v. Hutto*, 724 F.2d 396 (4th Cir. 1983), *adhered to en banc*, 754 F.2d 520 (1985), *rev'd sub nom. Murray v. Carrier*, 477 U.S. 478 (1986).

The Court granted certiorari in *Carrier* to resolve the debate. "We granted certiorari in this case to consider whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons." *Murray v. Carrier*, 477 U.S. at 481-82. *See also Carrier v. Hutto*, 724 F.2d at 401 (4th Cir. 1983) ("we conclude that attorney error short of wholesale ineffectiveness of counsel can constitute *Wainwright* cause").

counsel's failure to raise the claim in question," *id.* at 487, and that the determination would be difficult. *Id.* at 488 ("Does counsel act out of 'ignorance,' for example, by failing to raise a claim for tactical reasons after mistakenly assessing its strength on the basis of an incomplete acquaintance with the relevant precedent? The uncertain dimensions of any exception for 'inadvertence' or 'ignorance' furnish an additional reason for rejecting it."). *See also id.* at 492.

Thus, the Court chose the functional standard set forth in *Strickland*. That standard provides federal courts with a yardstick familiar in both constitutional and non-constitutional settings.[18] It is also a reasonable gauge for when to attribute attorney error to a petitioner and when

[18] In the abuse-of-the-writ context, for example, the Fifth Circuit has recognized that habeas counsel's ineffectiveness may excuse a claim's omission from a prior habeas petition:

> Counsel competence in habeas proceedings is not a constitutional inquiry, since a state has no constitutional duty to provide counsel in collateral proceedings. Instead the question is whether such incompetence excuses the failure to include the new claim in the old petition. . . . The standard for measuring competence of counsel, while developed in the context of constitutional right, is a familiar one. We are persuaded that this standard vindicates the competing values of facilitating judicial review of meritorious claims and finality of criminal convictions in habeas cases.

Jones v. Estelle, 722 F.2d 159, 167 (5th Cir. 1983) (*en banc*), *cert. denied*, 466 U.S. 976 (1984); *Daniels v. Blackburn*, 763 F.2d 705, 710 (5th Cir. 1985); *accord, Hanrahan v. Gramley*, 664 F. Supp. 1183, 1191 (N.D. Ill. 1987). *See also United States v. Golden*, 854 F.2d 31, 32 (3rd Cir. 1988).

to relieve a petitioner of the effects of such error. While the risk of an attorney's strategic decisions and inadvertent mistakes can be fairly borne by a petitioner, a lawyer's wholesale ineffectiveness cannot. *Cf. Carrier*, 477 U.S. at 488, 492. Thus, the failure to perfect an appeal, whether or not by a constitutionally-required lawyer, constitutes cause.

2. *Murray v. Carrier* makes clear that cause need not be an independent constitutional violation.

While the precise parameters of the cause and prejudice standard remain to be defined,[19] it is indisputable that cause need not be an independent constitutional violation. *See, e.g., Murray v. Carrier*, 477 U.S. at 489 ("The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause – a question of federal law – without deciding an independent and unexhausted constitutional claim on the merits."); *id.* at 488 (listing examples of cause).[20]

[19] The Court has intentionally left the content of the cause and prejudice standard somewhat vague, preferring to elaborate the standard when faced with particular procedural default situations. *See, e.g., Smith v. Murray*, 477 U.S. 527, 533-34 (1986); *Reed v. Ross*, 468 U.S. 1, 13 (1984); *Wainwright v. Sykes*, 433 U.S. at 87, 91 (1977).

[20] In *Carrier*, the Court noted that exhaustion doctrine "generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." 477

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It would indeed be incongruous to require that a petitioner show that an independent constitutional violation caused his procedural default because, if it had, the petitioner would normally be entitled to relief on the basis of that violation and would not have to rely on cause and prejudice.[21] The Court has never required such a showing. Rather, it has made clear that cause for failing to comply with state procedural rules may consist of a showing that the facts supporting the claim were unavailable at the time of the default, *e.g., Amadeo v. Zant*, 486 U.S. 214, 222, 224 (1988), that interference by state officials (not necessarily rising to the level of an independent constitutional violation) prevented the timely assertion of a claim, *e.g., Murray v. Carrier*, 477 U.S. at 488, or that some other external impediment made compliance with the state's procedural rule impracticable. *Id.*

Of course, where an attorney's performance violates the sixth amendment, the Constitution itself requires the default to be attributed to the state, rather than to the defendant. *Id.*[22] But the question posed by *Sykes* and

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U.S. at 489. However, because ineffective assistance of state habeas counsel does not rise to the level of an independent constitutional claim, exhaustion is unnecessary. *Id.*

[21] State rules enforcing procedural defaults caused by independent constitutional violations or state action would also presumably fail adequacy review; there would be no need for cause if it were to be limited to such factors.

[22] "[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." *Id.*

Carrier is not whether the default may be imputed to the state, but rather whether the petitioner can fairly be held responsible for the default. *E.g., Sykes*, 433 U.S. at 91 & n.14; *Carrier*, 477 U.S. at 492. It is not fair to hold the petitioner responsible for defaults caused by an ineffective lawyer. By performing outside "reasonable professional" standards the lawyer ceases to be an agent of the petitioner and instead becomes an obstacle to the defense. *Cf. Carrier*, 477 U.S. at 488, 492.[23] For that reason, attorney error that rises to the level of ineffectiveness should constitute cause regardless of whether the attorney was constitutionally required.

3. *Murray v. Carrier* teaches that "the standard for cause should not vary depending on the timing of a procedural default."

Limiting cause based on attorney error to independent sixth amendment violations rather than to attorney incompetence meeting the functional standard set forth in *Strickland* would also clash with *Murray v. Carrier's* teaching that state procedural defaults are to be treated consistently regardless of the stage at which they occur:

> A State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack. . . . We likewise believe that *the standard for cause should not vary depending on the timing of a procedural default.*

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[23] The Court has recognized that counsel's actions short of constitutional violations may constitute cause. *See Reed v. Ross*, 468 U.S. 1, 14-15, 16 (1984) (recognizing as cause attorney's failure to raise a legal claim "not reasonably available" to him without suggesting that attorney's failure rose to the level of an independent constitutional violation).

477 U.S. at 490-91 (emphasis added); *see Smith v. Murray*, 477 U.S. 527, 533 (1986) (reiterating *Carrier's* holding that trial and appellate defaults are to be evaluated under identical standards).[24]

There is no sound rationale for making it harder to show cause to excuse defaults occurring on collateral attack than to excuse defaults on direct appeal. *See Murray v. Carrier*, 477 U.S. at 491 ("the standard for cause should not vary depending on . . . the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process"); *Smith v. Murray*, 477 U.S. at 533 ("concerns for finality and comity are virtualiy identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure"); *Reed v. Ross*, 468 U.S. 1, 10 (1984) ("Each State's complement of procedural rules facilitates this complex process [of assuring accurate and constitutional verdicts], channeling, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.").[25]

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[24] There is no constitutional right to counsel, and thus no constitutional right to effective assistance of counsel, for discretionary appeals. *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974); *Wainwright v. Torna*, 455 U.S. 586, 587 (1982). It is therefore impossible to reconcile the Court's reiteration that trial and appellate defaults are to be treated identically with an interpretation of *Murray v. Carrier* that limits cause for attorney ineffectiveness to independent constitutional violations.

[25] If there is to be any distinction, standards for cause should be lower when a default occurs on collateral attack. *See*

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But limiting cause based on attorney error to independent constitutional violations of the right to effective assistance of counsel would accomplish just such a distinction between procedural defaults at various stages of the judicial process. It would eliminate attorney ineffectiveness – a significant source of procedural default – as cause excusing procedural defaults occurring on discretionary appeals and collateral review of convictions. It would thus make it more difficult to show cause to excuse a procedural default simply because the default occurred at one stage rather than another of the conviction and review process.

Such a rule would be intolerable. If federal courts were to recognize state procedural defaults uniformly regardless of the stage at which they occur, but to find cause differently depending on whether there was a constitutional right to counsel at the stage at which the default occurred, state prisoners would be treated inconsistently. Access to federal courts would vary with the luck of the draw: if the default occurred on direct appeal it would be excused, if not, it would be enforced. The inequity of such a result is increased by the fact that petitioners who have no constitutional right to effective assistance of counsel are considerably more likely to founder in their attempts to navigate complex appellate and collateral review procedures than are those who have

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Gilmore v. Armontrout, 867 F.2d 1179, 1180 n.1 (8th Cir. 1989) (Lay, C.J., dissenting from denial of rehearing *en banc*). By providing for collateral review, a state concedes that its interest in the finality of criminal convictions can be outweighed by the need to correct fundamentally unfair convictions.

the right to the assistance of nominally effective counsel. *See generally Murray v. Giarratano*, 109 S. Ct. 2765, 2772 (1989) (Kennedy, J., concurring); *id.* at 2778-80 (Stevens, J., dissenting).

If default rules are to be enforced consistently at all trial and review stages, the decision to excuse a default should be based on the same standard. Attorney conduct that justifies excusing a default on direct review should excuse the same default on collateral review.

4. The safeguard of effective representation is integral to procedural default doctrine.

Finally, but perhaps most importantly, a holding that ineffective assistance of habeas counsel does not constitute cause would remove the safeguard that *Murray v. Carrier* relies on to prevent miscarriages of justice. Responding to the concerns raised by the concurrence of Justice Stevens, the majority wrote:

> There is an additional safeguard against miscarriages of justice in criminal cases . . . . That safeguard is the right to effective assistance of counsel. . . . *The presence of such a safeguard may properly inform this Court's judgment in determining "[w]hat standards should govern the exercise of the habeas court's equitable discretion" with respect to procedurally defaulted claims. Reed v. Ross*, [468 U.S. 1, 9 (1984)]. The ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremedied manifest injustices.

477 U.S. at 496 (emphasis added). *See also Smith v. Murray*, 477 U.S. at 539 (no fundamental unfairness requiring the exercise of federal habeas jurisdiction "when the defendant was represented by competent counsel, had a full and fair opportunity to press his claim in the state system, and yet failed to do so in violation of a legitimate rule of procedure").

The Court has thus relied on the effective assistance of counsel to overcome any flaws in the doctrine of procedural default that might result in fundamental unfairness for federal habeas petitioners. That safeguard falls unless ineffective assistance of counsel on discretionary or collateral review constitutes cause.

B. Procedural Defaults Resulting From The Ineffective Assistance Of Post-Conviction Counsel Must Be Excused.

1. Because ineffective assistance of post-conviction counsel is not an independent constitutional violation, it must constitute cause.

Six justices in *Murray v. Giarratano* recognized the need for legal assistance to aid capital prisoners seeking to vindicate constitutional claims in habeas proceedings. *Murray v. Giarratano*, 109 S. Ct. at 2772 (Kennedy, J., joined by O'Connor, J., concurring in the judgment); *id.* at 2776 (Stevens, J., joined by Brennan, J., Marshall, J., Blackmun, J., dissenting).[26] The majority of the Court held that

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[26] Virginia's procedures for securing post-conviction representation for death row prisoners are less "far reaching and effective" than those in other states. *See Murray v. Giarratano*, 109 S. Ct. at 2773 (Kennedy, J., concurring in the judgment); *id.* at 2781-82 (Stevens, J., dissenting).

such legal assistance was, nonetheless, not constitutionally required. 109 S. Ct. at 2770-71.

Petitioner does not seek to reargue *Giarratano*. But, given *Giarratano*'s recognition of the crucial role of counsel in collateral review, we respectfully submit that habeas counsel's ineffectiveness must constitute cause. It is one thing to allow states discretion in deciding how to give prisoners meaningful access to the judicial process. It would be quite another to direct the federal courts to close their doors to federal constitutional claims defaulted through the ineffectiveness of state post-conviction counsel.

The Constitution allows states "substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review." *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987). *See Murray v. Giarratano*, 109 S. Ct. at 2772 (O'Connor, J., concurring) (states have "considerable discretion in assuring that those imprisoned in their jails obtain meaningful access to the judicial process"). States are not required to provide a forum for discretionary appeals or collateral attacks on convictions. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 611 (1974); *Pennsylvania v. Finley*, 481 U.S. at 559. And even when states choose to allow such review, they are under no obligation to provide counsel. *Murray v. Giarratano*, 109 S. Ct. at 2769; *Wainwright v. Torna*, 455 U.S. 586, 587 (1982).

Recognition of states' "substantial discretion" to shape post-conviction remedies should not, however, lead to a regime under which federal review of federal constitutional claims can be frustrated by the ineffective

performance of state habeas counsel. So long as ineffective assistance of state post-conviction counsel constitutes cause, this result will be avoided, and the availability of federal review will not be reduced to a matter of caprice or chance.

2. Ineffective assistance of counsel in the first forum in which a constitutional claim may be vindicated must constitute cause.

Where constitutional claims cannot be raised until collateral review, ineffective assistance of counsel in connection with that review must constitute cause. Coleman could not have raised claims of ineffective assistance of trial counsel during the direct review of his conviction.[27] *See Walker v. Mitchell*, 224 Va. 568, 571, 299 S.E.2d 698, 699-700 (1983); *Murray v. Giarratano*, 109 S. Ct. at 2778-79 (Stevens, J., dissenting). Prisoners in Virginia are thus precluded from asserting certain fundamental constitutional rights in state proceedings in which they are constitutionally entitled to the assistance of counsel. They are forced instead to rely on post-conviction review, where

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[27] Likewise, Coleman's juror bias and some of his *Brady* claims were not available until collateral review. At the time of his direct appeal, Coleman could not have known that a juror had lied at voir dire in order to be seated on the jury to help "burn" Coleman. (Fourth Cir. App. 680.) Coleman also had no reason to suspect that the prosecution had withheld an investigative report indicating that there was a "pry mark" on the door of the McCoy household. (Fourth Cir. App. 1114.) This evidence of forced entry would have helped Coleman refute the prosecution's assertion that Ms. McCoy knew her attacker.

they have no right to counsel and thus no constitutional guarantee of effective assistance of counsel, for vindication of those rights.[28]

Ironically, Roger Coleman has been asserting that his trial counsel provided ineffective representation since immediately following his change of venue hearing at which counsel was so inadequately prepared and presented so little evidence that the trial court offered a continuance (which counsel refused).[29] But under Virginia procedure, Coleman was not allowed to raise his

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[28] Prior to July 1, 1985, no claim of ineffectiveness of counsel could be raised on direct review in Virginia. *See Dowell v. Commonwealth*, 3 Va. App. 555, 562, 351 S.E.2d 915, 919 (1987) (citing *Walker v. Mitchell*). From July 1, 1985 through July 1, 1990, ineffectiveness claims could be raised on direct review where "all matters relating to such issue [were] fully contained within the record of the trial." Va. Code § 19.2-317.1. That statute has recently been repealed. 1990 Va. Acts c. 74 (eff. July 1, 1990).

[29] Letter of Roger Coleman to Judge Persin, dated February 15, 1982 (commenting on fact that attorney seemed "ill prepared" and had failed to muster available evidence) (Fourth Cir. App. 34-36.) The attorney responsible for Coleman's change of venue hearing notified co-counsel thirty minutes before the hearing that he did not plan to appear. Perhaps as a result, Coleman's counsel offered no affidavits, no witnesses other than Coleman's father, and no evidence other than five newspaper articles, three of which Coleman himself provided immediately before the hearing. The failure to secure a change of venue and the failure to conduct an adequate voir dire examination contributed to the seating of a jury which knew that Coleman had a prior conviction for attempted rape and of a juror who had previously stated that he wanted to get on the jury to "help burn the S.O.B." (Fourth Cir. App. 18, 747-48, 756, 674, 680, 962.)

ineffectiveness claim until state habeas. There, the ineffective assistance of his state habeas counsel in failing to file a timely appeal caused the claim to be defaulted. Virginia thus places petitioners in a Catch-22 situation: by the time they are allowed to raise their claims of ineffective assistance of trial counsel, they no longer have the constitutional right to be assisted by counsel. Without the right to such assistance, petitioners are more likely to default on their claims. And when they do, they will have no remedy for the default.

The Virginia rule limiting ineffectiveness claims to collateral review thus makes it likely that petitioners will consistently be denied the right to litigate their sixth amendment claims in federal court. If Coleman's default had occurred instead on direct appeal, he might have been precluded from further state review of his ineffectiveness claim.[30] But he would nonetheless have been entitled to federal habeas review of the claim. *See Murray*

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[30] Virginia's rationale for limiting ineffectiveness claims to collateral review is two-fold: *(1)* because ineffectiveness claims will not ordinarily be developed on the trial record, such claims often require an evidentiary hearing that is more appropriate on collateral than direct review; and *(2)* if such claims could be raised on direct appeal, the Commonwealth's procedural default rules might preclude further state-court litigation of ineffective assistance claims defaulted at trial and direct appeal or decided adversely on direct appeal because of an inadequately-developed record. *See Walker v. Mitchell*, 224 Va. at 570-71, 299 S.E.2d at 699. A state's decision as to the time at which constitutional claims may be asserted is, in large part, its own business. But the state's decision should not be allowed to control federal habeas court review of federal constitutional claims. *Cf. Ex. parte Hull*, 312 U.S. 546, 549 (1941).

v. Carrier, 477 U.S. at 488 (ineffective assistance of counsel is cause for procedural default). *See also Kimmelman v. Morrison*, 477 U.S. 365 (1986); *Osborn v. Shillinger*, 861 F.2d 612, 622-23 (10th Cir. 1988). The result must be the same in this situation, where the default occurred on collateral review, particularly if the claim could not be raised on direct review. Otherwise, by channeling constitutional claims into collateral rather than direct review, states will be able to control the likelihood of federal habeas review of federal constitutional claims.[31] A procedural default doctrine that lends itself to such manipulation is indefensible.

The comity concerns that led to the creation of the procedural default doctrine are not served when the state channels review in a way that impedes the vindication of federal claims. *See, e.g., Murray v. Carrier*, 477 U.S. at 488 (cause includes objective factors external to the defense such as interference by state officials); *Alcorn v. Smith*, 781 F.2d 58, 63 (6th Cir. 1986) ("An inadequate state forum for presenting sufficiency of the evidence claims will constitute 'cause' for the procedural default."). *See also Bartone v. United States*, 375 U.S. 52, 54 (1963) (per curiam) ("Where state procedural snarls or obstacles preclude an

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[31] A procedural default that precludes vindication of a petitioner's claim of ineffective assistance of trial counsel may affect not only his sixth amendment right to counsel, but also any other constitutional rights defaulted at trial as a result of trial counsel's ineffectiveness. *Cf. Justus v. Murray*, 897 F.2d 709, 714 (4th Cir. 1990) (ineffective assistance of counsel claim may constitute cause only if it has been exhausted in state court and is not procedurally defaulted).

effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding."); *Brown v. Western Ry.*, 338 U.S. 294, 298-99 (1949) ("Strict local rules . . . cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."); *Ex parte Hull*, 312 U.S. 546, 549 (1941) ("the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus"); *Spencer v. Kemp*, 781 F.2d 1458, 1470 (11th Cir. 1986); (petitioner will not be denied federal review of constitutional claim where state procedure treated claim unfairly).

The Court should adopt a rule that, at a minimum, ensures that petitioners do not lose their ability to raise federal constitutional claims in federal court because of the ineffective assistance of counsel in the first state forum in which the federal claims could be raised. *Cf. Evitts v. Lucey*, 469 U.S. 387, 401-02 (1985) (state cannot evade requirements of federal law by calling appeal as of right discretionary).

III.

THE *FAY v. NOIA* DELIBERATE BYPASS STANDARD APPLIES TO COLEMAN'S FAILURE TO APPEAL.

While the circumstances here satisfy the cause and prejudice standard of *Carrier* and *Sykes*, the deliberate bypass standard of *Fay v. Noia*, 372 U.S. 391 (1963), provides an alternative ground for holding that any procedural default that barred Coleman's appeal to the Virginia Supreme Court does not prevent federal habeas

review. In fact, *Noia* continues to supply the most appropriate means of determining whether federal habeas review is precluded as a result of a petitioner's failure to take a state appeal.[32]

The federal habeas petitioner in *Noia* had failed to take a direct appeal from his conviction for felony murder because he feared that upon retrial he might receive the death penalty. After the convictions of two codefendants were vacated on the ground that the confessions underlying both their and Noia's convictions had been coerced, Noia sought *coram nobis* review, which was denied on the ground that he had failed to appeal from his original conviction. 372 U.S. at 395-96 & nn.2-3. The federal district court denied habeas relief based on the state default. *Id.* at 396.[33]

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[32] In *Carrier*, the Court expressly reserved on the question "whether counsel's decision not to take an appeal at all might require treatment under [the deliberate bypass] standard." *Carrier*, 477 U.S. at 492. Several courts have recognized that *Noia* remains applicable to cases within its core rationale. *See, e.g., Osborn v. Shillinger*, 861 F.2d 612, 623-24 (10th Cir. 1988) (applying *Noia*'s deliberate bypass standard to failure to appeal denial of state habeas petition); *Presnell v. Kemp*, 835 F.2d 1567, 1577 (11th Cir. 1988) ("[the cause and prejudice test] did not render [*Noia*] a dead letter"), *cert. denied*, 488 U.S. 1050 (1989); *Ashby v. Wyrick*, 693 F.2d 789, 794 (8th Cir. 1982) (*Noia* approach is appropriate where default involves choice customarily made by client).

The Fourth Circuit attempted to avoid the application of *Noia* by drawing a specious distinction between the failure to implement a decision to appeal and a failure to appeal. 895 F.2d at 143-44. (JA 59-60.) The distinction does not hold because, in each case, the default is the failure to appeal.

[33] The Second Circuit reversed, holding that exceptional circumstances excused Noia's default, which it termed a failure to exhaust. *Id.* at 397.

This Court held that federal habeas review was not barred because Noia had not "deliberately by-passed the orderly procedure of the state courts." *Id.* at 438. Grounding the deliberate bypass test on the familiar notion of waiver as "an intentional relinquishment or abandonment of a known right or privilege," *id.* at 439 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)), the Court held that a state default would bar federal habeas review if the petitioner "understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures." *Id.* The Court also recognized that certain decisions of counsel could result in procedural defaults barring federal habeas review. *Id.* ("[a] choice made by counsel not participated in by the petitioner does not *automatically* bar relief") (emphasis added).

Soon after *Noia*, the Court elaborated its view that counsel's decisions would, in many circumstances, bind the federal habeas petitioner. For example, in *Henry v. Mississippi*, 379 U.S. 443, 451-52 (1965), the Court observed that the petitioner would bear the consequences of any default resulting from his trial counsel's decision not to make a contemporaneous objection to the admission of constitutionally tainted evidence. Similarly, in *Estelle v. Williams*, 425 U.S. 501, 509 n.3 (1976), the Court held that the *Johnson v. Zerbst* waiver standard would not apply "to strategic and tactical decisions, even those with constitutional implications, by a counseled accused."

Id. at 512.[34] Finally, in *Sykes* the Court held that the cause and prejudice standard would apply to a default resulting from failure to comply with a contemporaneous objection rule at trial, noting that *Noia*'s suggestion of a more lenient standard was *dictum*. 433 U.S. at 87-88, 91 n.14. *See id.* at 94-95 (Stevens, J., concurring) (*Sykes* "is consistent with the way . . . federal courts have actually been applying [*Noia*]").[35]

The decision in *Sykes* was informed by two principal concerns. First, if applied to trial determinations, the deliberate bypass standard would undermine the legitimate objective of making sure that the trial is the "main event" at which all issues bearing on the substance and the conduct of the case are presented. Second, it was feared that the deliberate bypass rule would interfere with finality and give trial counsel an incentive to attempt a strategy of "sandbagging" – gambling on a verdict of not guilty while holding back some federal constitutional issues so that a guilty verdict could be attacked on federal habeas. *Id.* at 88-90. Later, in *Carrier*,

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[34] *See also Henderson v. Kibbe*, 431 U.S. 145, 157 (1977) (Burger, C.J., concurring) (noting distinction between post-trial omission in *Noia* and omissions during the course of the trial); *Mullaney v. Wilbur*, 421 U.S. 684, 704 n.* (1975) (Rehnquist, J., concurring) (*Noia* rule encompassed the decision not to utilize the appeal process, but should not apply to the failure to make a specific objection during trial).

[35] The Court did not question either the holding of *Noia* or the reasoning of that decision as applied to its facts. 433 U.S. at 87-88 ("It is the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject."); *id.* at 88 n.12.

the Court recognized that the state's interest in its procedural rules and the threat of providing an incentive to sandbagging required that the cause and prejudice standard apply with equal force to defaults resulting from the failure to raise particular claims on appeal. 477 U.S. at 490-93, 492 ("appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review"); *cf. Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (good appellate counsel winnow arguments and focus on one central or a few key issues).

Sykes's rejection of a broad reading of the deliberate bypass rule rests on a pragmatic view of the criminal process. As Chief Justice Burger explained, because trial decisions are "necessarily entrusted to the defendant's attorney, who must make on-the-spot decisions at virtually all stages of a criminal trial," it would be impossible to require that the defendant participate in a decision in order to be bound by it. *Sykes*, 433 U.S. at 93-94 (Burger, C.J., concurring).[36]

Neither of the premises of *Sykes* is present where (as here) the state declines to address federal constitutional issues because the petitioner's attorney has failed to file a timely appeal. The state's interest in requiring that the

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[36] *See id.* at 98 (White, J., concurring) ("The bypass rule, however, as applied to events occurring during trial, cannot always demand that the defendant himself concur in counsel's judgment."); *id.* at 94-95 (Stevens, J., concurring) ("The notion that a client must always consent to a tactical decision not to assert a constitutional objection to a proffer of evidence has always seemed unrealistic to me.").

federal constitutional issues be raised as part and parcel of the case as a whole is not promoted by barring review where counsel has failed to appeal at all. Equally, there can be no reasonable strategic advantage to forgoing state review altogether, and hence application of the deliberate bypass rule in these circumstances will not encourage sandbagging or otherwise interfere with finality.

Defaults that extinguish all further state remedies cannot be compared to the pruning of legal arguments that necessarily occurs during trial and on appeal. When counsel fails to assert a claim on appeal, only that specific claim is lost. The failure to appeal at all, however, results in the loss of an entire stage of proceedings and with it the opportunity to pursue *all* claims. In this respect, the failure to take an appeal at all is more akin to the decision to plead guilty than to the failure to raise a particular issue on appeal. With either decision, the individual forgoes an entire stage of legal proceedings established to provide a fair determination of his claims. *See Forman v. Smith*, 633 F.2d 634, 640 & n.8 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) (suggesting that deliberate bypass remains the appropriate standard where "the procedural default eliminates an entire stage of court proceedings, while Sykes applies to procedural defaults that abandon only a specific claim"). Therefore, just as the decision to forgo a challenge to the state's accusations rests solely with the defendant, so too should the decision to challenge the judgment as a whole rest solely with the defendant.

Indeed, this Court has expressly held that while an attorney has the discretion to decide which issues to raise on appeal, "the accused has the ultimate authority to

make certain fundamental decisions regarding the case, [such as] whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. at 751; *see id.* at 750-54. It follows that defaults that have the effect of frustrating the defendant's decision on fundamental matters cannot be evaluated in the same manner as defaults arising from strategic decisions at trial or on appeal that are entrusted to the attorney.[37] Accordingly, the deliberate bypass standard remains applicable to those fundamental decisions – like deciding whether to appeal – that can only be made by the defendant. *Sykes*, 433 U.S. at 92-94 (Burger, C.J., concurring); *id.* at 92 (where "important rights h[a]ng in the balance of the *defendant's own decision*, . . . a waiver impairing such rights [must] be a knowing and intelligent decision by the defendant himself"). A lawyer's strategic decisions or inadvertent mistakes cannot interfere with decisions that were never his to make.

Applying the deliberate bypass standard here, it is plain that Coleman has not defaulted.[38] It is beyond

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[37] In each case in which the Court has applied the cause and prejudice standard to a failure to raise a particular issue on appeal, it has emphasized the attorney's responsibility for the decision at issue. *See, e.g., Carrier*, 477 U.S. at 492; *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982) (applying cause and prejudice to inadvertent as well as strategic failure to raise particular issues at trial); *Smith v. Murray*, 477 U.S. at 534-36 (applying cause and prejudice standard to failure to raise constitutional claim on appeal); *Reed v. Ross*, 468 U.S. 1, 15-16 (1984) (applying cause and prejudice standard to failure to raise novel constitutional argument).

[38] It is irrelevant from the perspective of federal habeas review whether the failure to appeal occurred on direct or

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dispute that Coleman did not knowingly and intelligently waive his right to seek state appellate review of his federal constitutional claims. Coleman should not lose the right to have a federal habeas court review those claims simply because his state habeas counsel could not get a notice of appeal filed on time.

CONCLUSION

For the foregoing reasons, Petitioner Roger Keith Coleman respectfully requests that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed and the cause be remanded to the Fourth Circuit for further proceedings.

Respectfully submitted,

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collateral review. *Carrier*, 477 U.S. at 489-91. In either case the result is the same: because of one misstep, all further state and federal review is extinguished. Indeed, in Virginia, where certain fundamental constitutional claims may be litigated only in post-conviction review, there can be no distinction between the failure to take a direct appeal and the failure to take a habeas appeal.